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No. 00-1363

Supreme Court, U.S.
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In The

Supreme Court of the United States

CREIGHTON E. MILLER, Administrator of the Estate of JABE J. FINCHER, SR., Deceased,

Petitioner,

v.

AMERADA HESS CORPORATION; AMOCO CORPORATION; ASHLAND OIL, INC.; ATLANTIC RICHFIELD COMPANY; CROWN CENTRAL PETROLEUM CORPORATION; EXXON CORPORATION; GULF OIL CORPORATION; HESS OIL VIRGIN ISLANDS CORPORATION; MARATHON OIL COMPANY; MONSANTO COMPANY; SHELL OIL COMPANY; SINCLAIR REFINING COMPANY; STANDARD OIL COMPANY; STANDARD OIL COMPANY OF INDIANA; SUN COMPANY, INC. (R&M); TEXACO, INC.; UNION CARBIDE CORP.; KEYSTONE TANKSHIP CORP.; MARINE TRANSPORT LINES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITIONER'S REPLY BRIEF

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Preface

An attorney with many years of experience suffering the "slings and arrows" of litigation had occasion to read Fincher's Petition submitted in this matter. He advised counsel undersigned, in essence, that facts before this Court take the prize for egregious unfairness perpetrated by the legal system. As one jurist wrote, when a case is over,

> although a litigant may be disappointed in the outcome, he should leave the courthouse feeling that he has been treated fairly[.]

Anderson v. Sheppard, 856 F.2d 741, 745-746 (6th Cir. 1988). Estate of Fincher was not treated fairly in this case. Are the noble principles of Due Process of Law requiring notice before a party is stripped of important rights "just talk," or are they *living* principles that courts of law *must* follow?

I. Petitioner's Repeated Assertions of Lack of Notice and Lack of Fundamental Fairness Implicitly Raised the Constitutional Questions Now Urged for Review.

Respondents ignore literally pages of citations to the record found in the Petition (pp. 8-12), stating blithely that "there were no federal constitutional rights implicated or affected." As those citations show, however, Fincher repeatedly asserted to the state court that he had been deprived of notice – which no one disputes – and that this deprivation rendered the denial of his right to appellate review fundamentally unfair. Those two factors of notice and fundamental fairness are the two pillars of

Federal Due Process. The state court ruling, although resting ostensibly upon state law, necessarily and unavoidably "implicates an underlying question of federal law,"[1] and cannot be shielded from review on certiorari.[2] It has never been regarded as essential to review on certiorari that a federal-law issue be raised *expressly*. *See Webb v. Webb*, 451 U.S. 493, 496-97 (1981) (record may show that federal claim was raised by implication; Court has not insisted upon "inflexible specificity.").

Moreover, this precise argument was rejected under very similar facts in *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80, 523 N.E.2d 851 (Ohio 1988), discussed in the Petition. In that case the Ohio Supreme Court held that the constitutional right to reasonable notice of an adverse judgment had been adequately raised in the court below where appellants argued

> that the notice of appeal was not filed until January 22, 1987, because they did not know, until January 9, 1987, that a judgment entry had been filed. Appellants' unrefuted affidavits to this effect clearly raise the issue of the right to reasonable notice of a final order. . . .

37 Ohio St.3d at 82.

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[1] *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 388 (1986); *Ake v. Oklahoma*, 470 U.S. 68 (1985).

[2] "What this Court *says* in the opinions in a particular case is not as important to the particular litigants as what this Court actually *does* with the case." *Brown v. Dade Christian Schools, Inc.*, 581 F.2d 472, 473 (5th Cir. 1978) (italics in the original.).

Respondents argue that Fincher should have briefed and argued the Federal constitutional questions in his Motion to Extend Time to File Appeal as of Right [App. 29-34]. However, it was clear from conversations with the trial judge's staff that the trial court recognized that a mistake had been made in failing to serve Fincher's counsel; that any dereliction was on the part of courthouse staff and not on Fincher's counsel; and that the trial court was receptive to a request for relief [App. 127, ¶¶ 9-10]. There was no occasion to "make a federal case" out of what appeared to be easily remedied under the state procedural rules permitting an extension of time to file an appeal.

Respondents similarly assert that Fincher should have briefed and argued federal-law issues at length in the response to the motion to dismiss the appeal filed in the Alabama Supreme Court. However, the issues raised by that motion were confined to whether the trial court had properly exercised its discretion under Alabama state law [App. 58-63]. It would not have been proper for Estate of Fincher to adopt a "kitchen sink" approach to pleading its response to the motion to dismiss. *See Tonti v. Petropoulos*, 656 F.2d 212, 220 (6th Cir. 1981) (decrying "kitchen sink" approach to pleading as "wasteful").

Respondents' assertion that Fincher ought to have filed an application for rehearing in the Alabama Supreme Court has no more merit. Respondents ignore the fact that the decision was 8-1. The majority opinion embodies a conviction that Fincher simply was not entitled to notice of the trial court's decision under the governing law. Fincher submits that making a more specific argument as to federal law had no reasonable prospect of

swaying the views of the state court. The law never requires vain and useless acts.[3]

II. The Decision in Question Is in Direct Conflict With Decisions of This Court and the Ohio Supreme Court.

Respondents' assertion that Fincher has failed to show that the decision of the court below conflicts with relevant decisions of this Court or the highest court of another state simply ignores the decisions of this Court cited in Fincher's Petition (pp. 12-22), and the decisions of the Ohio Supreme Court (pp. 22-25). A first-year law student would instantly recognize that the Ohio cases are "on all fours."

III. This Court Has the Power and the Duty to Prevent Fundamental Unfairness, Even Assuming the Matters at Issue Were Not Fully Raised Below.

Even assuming, without conceding, that the federal constitutional issues were not raised below, this does not deprive this Court of jurisdiction or pose any "insuperable bar" to review. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). *See also Illinois v. Gates*, 462 U.S.

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[3] *See Ohio v. Roberts*, 448 U.S. 56, 74, 100 S.Ct. 2531, 2543, 65 L.Ed.2d 97 (1980) (law does not require a futile act); *Hardin v. Hayes*, 52 F.3d 934, 938 (11th Cir. 1995); *Abdallah v. Abdallah*, 359 F.2d 170, 175 (3d Cir. 1966) ('the law, which is eminently practical, does not require the doing of a vain thing'); *Northern Heel Corp. v. Compo Industries, Inc.*, 851 F.2d 456, 461 (1st Cir. 1988) ("The law should not be construed idly to require parties to perform futile acts or engage in empty rituals.").

213, 219 (1983) (issue "not pressed or passed upon below," may present a prudential or discretionary restriction, not a per se lack of jurisdiction);[4] *Heath v. Alabama*, 474 U.S. 82, 87 (1985) (failure to raise below not jurisdictional.).

In a concurring opinion in *Webb v. Webb*, 451 U.S. 493, 502 (1981), Justice Powell states:

> [T]he Court has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness. *Wood v. Georgia*, 450 U.S. 261, 265 (1981). See also, *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (finding plain error in an appeal from a state court).

"Fundamental unfairness" is precisely what the facts of this case present. Under a mandatory, non-discretionary provision of law, the state court had an imperative duty to give notice of the entry of the summary judgment rendered against Estate of Fincher. In five years of litigation, the state court had performed that duty without exception. The state court had established a mechanism for counsel to follow the status of their cases – by regularly checking their courthouse boxes. It is undisputed that Fincher's local counsel did this *nearly every day*. To require that Fincher's counsel should have been personally pestering overburdened court clerks, inquiring about

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[4] The Court cites *Terminiello v. Chicago*, 337 U.S. 1 (1949), and *Vachon v. New Hampshire*, 414 U.S. 478, 479 n.3 (1974), as support for that proposition.

the status of the motion, is to ignore the reality of the way the real world functions.[5]

This Court has the power to examine the record to arrive at an independent judgment as to whether constitutional rights have been invaded *General Motors Corp. v. Washington*, 377 U.S. 436, 441-442 (1964). The Court should exercise that power in this case and do justice by granting certiorari.

IV. Respondents Ignore Petitioner's Serious Claims of Unconstitutionality, Contenting Themselves With *Ipse Dixit* Assertions of Insubstantiality.

Fincher cited case after case in his Petition showing the egregious unfairness which resulted from his denial of his constitutional right to notice. Respondents do not touch this cogent argument with the proverbial ten-foot pole, contenting themselves with the unsupported *ipse dixit* assertion that the federal questions presented "are not substantial or meritorious." Respondents' Brief at 5. The meagerness of the response suggests powerfully that

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[5] One other matter deserves comment. In their brief Respondents suggest that Fincher's counsel should have inquired of their counsel about the entry of the Order (Respondents' Brief at 6). The sheer, unmitigated gall of this suggestion brings to mind the Yiddish word *chutzpah*. What the sworn affidavit testimony of record shows is that when Fincher's counsel did inquire of respondent's counsel as to what he knew concerning the trial court's disposition of the summary judgment motion, respondent's counsel gave answers deceptive in the extreme. *See* App. 102-104 (Fincher's brief detailing the incident); 127 (Carley Affidavit ¶ 8); 128 (Carley Affidavit ¶ 11).

Respondents have no response on the merits, and are desperate to procure a denial of relief on technicalities.

V. Respondents Misstate the Facts of the Case, Ignoring Their Duty to Cite to the Record.

In their response – such as it is – Respondents repeat a number of factual misstatements they have made previously, ignoring the appellate advocate's duty to cite to the record for contentions of fact. Petitioner underscores what he stated in his Petition: that motion hearings in Mobile County Circuit Court are not "on the record," and the trial judge never made any findings on the record clarifying precisely what happened on the day the motion for summary judgment was heard. Fincher's local counsel, Larry Moorer, disputed Respondents' claim that summary judgment was granted in open court [App. 118-119]. In the Alabama Supreme Court, Fincher suggested that the court might remand for clarification [App. 92-95], a suggestion the court denied *sub silentio*.

Respondents also state [Respondent's Brief at 6] that "[Fincher's] counsel failed to follow up on the results of the summary judgment hearing," despite the undisputed testimony of Larry Moorer that he was checking the courthouse distribution boxes nearly every day [App. 120].

VI. In the Alternative, the Court Should Remand This Cause to the State Court for Consideration of These Most Substantial Constitutional Questions.

Should the Court be disinclined to review these question on the record presented, at a minimum the Court should remand the cause pursuant to 28 U.S.C. § 2106[6] with directions for the Alabama state courts to consider further the federal constitutional questions. *See, e.g., Benton v. Maryland*, 395 U.S. 784, 798 (1969); *Morgan v. Garris*, 307 F.2d 179 (D.C.Cir. 1962). Indeed, two of this Court's decisions cited by Respondents point to the propriety of the Alabama state court considering these issues further on remand. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435 (1940) (remanding with invitation for state court to consider federal questions further); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 163 (1945) (concluding that further proceedings could be had in state court to litigate Commerce Clause issue). *See also Webb v. Webb*, 451 U.S. 493, 503 (1981) (Marshall, J., dissenting in part) (suggesting that Full Faith and Credit issue be remanded to Georgia courts).

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[6] 28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Conclusion

Petitioner Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, respectfully prays that the Court grant a Writ of Certiorari to review the decision of the Alabama Supreme Court. In the alternative, Petitioner prays that the Court remand his cause to the state court with directions to consider further his federal claims.

DATED this 12th day of April, 2001 at Detroit, Michigan.

Respectfully submitted,

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